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No. 80-660

In the Supreme Court of the United States

OCTOBER TERM 1980

SILVER SPUR CASINO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

AND RELATED CASES.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether there is a conflict between the decision sought here to be reviewed and decisions on the same matter of federal law of other Courts of Appeals.

2. Whether there is a conflict between panels of the Court below on the same matter of federal law.

3. Whether there is a conflict between the decision here rendered by the National Labor Relations Board (the Board) and other decisions on the same issue rendered by the Board.

4. Whether the Court below was in error in holding that the Board may ignore federal law and for policy reasons establish a presumption based upon two other presumptions.

5. Whether the Board establish a rebuttable presumption to which is given mere lip service and which in actual practice as applied by it is an absolute and irrebuttable presumption resulting in denial of due process.

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SILVER SPUR CASINO,

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Respondent.

NEVADA CLUB, INC.,

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v.

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Respondent.

FINALLY, INC. d/b/a THE PALACE CLUB,

Petitioner,

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

The Petitioners, SILVER SPUR CASINO (Silver Spur), NEVADA CLUB, INC. (Nevada Club), and FINALLY, INC. d/b/a THE PALACE CLUB (Palace Club), respectively, pray that a Writ of Certiorari issue to review the judgments and opinion of United States Court of Appeals for the Ninth Circuit entered in these proceedings on July 14, 1980. Two other respondent-companies in the proceedings below, BARNEY'S CLUB, INC. and SPARKS NUGGET, INC. d/b/a JOHN ASCUAGA'S NUGGET, will file separate petitions with this Court as to the separate judgments relating to separate matters which the Court of Appeals entered on August 18, and September 12, 1980, respectively. Petitioners here have common questions of fact and law which warrant separate consideration.

OPINION BELOW

The opinion of the Court of Appeals is reported at 623 F.2d 571. A copy of the opinion appears in the Appendix hereto.

JURISDICTION

The opinion of the Court of Appeals was filed on May 27, 1980. The judgments for each Petitioner, SILVER SPUR NEVADA CLUB and PALACE CLUB were entered on July 14, 1980. A copy of each judgment appears in the Appendix hereto. Separate judgments were entered on August 18, 1980 and September 12, 1980, respectively, as to BARNEY'S CLUB, INC. and SPARKS NUGGET, INC. d/b/a JOHN ASCUAGA'S NUGGET who are filing separate petitions to this Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether there is a conflict between the decision sought here to be reviewed and decisions on the same matter of federal law of other Courts of Appeals.

2. Whether there is a conflict between panels of the Court below on the same matter of federal law.

3. Whether there is a conflict between the decision here rendered by the National Labor Relations Board (the Board) and other decisions on the same issue rendered by the Board.

4. Whether the Court below was in error in holding that the Board may ignore federal law and for policy reasons establish a presumption based upon two other presumptions.

5. Whether the Board may establish a rebuttable presumption to which is gives mere lip service and which in actual practice as applied by it is an absolute and irrebuttable presumption resulting in a denial of due process.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.C., Constitution, Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Title 29:

§ 158(a)(5): It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employess . . .

§ 160(b): Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board

for such purposes, shall have the power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place fixed, nor less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States . . .

STATEMENT OF THE CASE

From 1951 to December 12, 1974, NEVADA CLUB was a member of a multi-employer group known as the Reno Employers Council (the Council). From 1968 to December 11, 1974, SILVER SPUR was a member of the Council. From 1969 to December 11, 1974, PALACE CLUB was a member of the Council. By December 12, 1974, SILVER SPUR, NEVADA CLUB and PALACE CLUB had timely withdrawn their memberships from the Council. During their periods of membership, each Petitioner was represented by the Council in collective bargaining and were parties to the Council's multi-employer collective bargaining agreement with Local 86 of the Hotel-Motel-Restaurant Employees International Union (the Union). Thereafter, the Petitioners' status was that of a single employer unit.

Based upon certain information which came to their respective attention, the managers of each Petitioner had a good faith doubt as to whether the Union continued to rep-

resent a majority of their employees. This prompted the withdrawal from the multi-employer unit.

There had never been a representation election, either in the larger unit or the individual units. By letter, on the dates mentioned, each Petitioner informed the Union of its withdrawal from the Council and the multi-employer unit, and that they were terminating the existing collective bargaining agreement effective as of the end of the term thereof. Subsequently, the Union's attorney wrote each Petitioner requesting that individual bargaining take place. Petitioners' attorney responded on behalf of each that they had a genuine doubt that the Union represented an uncoerced majority in an appropriate unit and urged the Union to petition for an election to demonstrate whether in fact they represented a majority. Petitioners, through their attorney, also offered to cooperate to expedite an election. The response of the Union was to file a refusal to bargain charge against each Petitioner.

Thereafter, a complaint issued and the matters were heard before an Administrative Law Judge. The SILVER SPUR matter was heard before Judge Boyce, the NEVADA CLUB and PALACE CLUB matters were heard before Judge Holmes. Before these trials and before the Regional Director issued the complaints, Petitioners filed petitions for separate representation elections. The Regional Director refused to process them on the ground that the charges blocked the election. The Union refused to withdraw the charges or to proceed to an election.

The Administrative Law Judges determined that Petitioners had violated the National Labor Relations Act [61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 15, et seq., §§ 158(a)(1) and (5)] by refusing to bargain. Both Judge's findings were based upon a presumption that the Union continued to rep-

resent a majority of each Petitioners' employees by reason of the multi-employer contract and that by derivation the presumption applied to the new single employer units. Each Judge concluded that the burden was upon Petitioners to prove that their refusal to recognize and bargain with the Union was based upon "a reasonably grounded good faith doubt" that the Union no longer continued to represent a majority of the employees of each Petitioner. Each Judge then proceeded to discuss each objective consideration in isolation and concluded that Petitioners had not rebutted the presumption.

A three-member panel of the Board, with one member dissenting, affirmed the Judge in NEVADA CLUB. In SILVER SPUR and PALACE CLUB, a different three-member panel affirmed the Judge. The Court below in enforcing the Board's orders took the same approach as did the Administrative Law Judges in analyzing the objective considerations.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts with the Decisions of Other Courts of Appeals as to the Application of the Presumption of a Union's Continuing Majority Status.

The decision of the Court below is in conflict with the Second, Sixth, Seventh, Eighth, Tenth and District of Columbia Circuits.

The Court below concedes as we shall point out, *infra*, that it is in conflict with these Circuits. The Court, as did the Board, not only departed from and ignored prior precedent as we shall discuss, *infra*, but treated each objective consideration which led Petitioners to raise in good faith their belief that the Union no longer represented a majority of their respective employees, in isolation rather than dealing with their cumulative effect. Such evidence con-

sisted of: (1) that the Union through its trustee publicly stated the Union represented only 20% of the employees in the multi-employer unit, (2) statements by employees that they were dissatisfied with the Union, (3) the Union mounted a desperate membership drive at the time they were demanding continuing recognition, (4) high employee turnover, (5) reports of employees dissatisfaction with the Union, (6) reports of the Union's inactivity, (7) no dues checkoff, (8) low level of membership among Petitioners' employees, (9) there never had been a representation election, (10) the Union had never been certified, (11) admissions by the Union's representative of the Union's lack of support, and (12) the change from a multi-employer unit to a single employer unit.

In *N.L.R.B. v. Alvin J. Bart and Co.*, 598 F.2d 1267 (C.A. 2, 1979) the Second Circuit rejected the Board's use of the presumption of majority status in factual circumstances substantially weaker than those relied upon by the Petitioners here. The Union had prevailed in a Board conducted election. After almost two years of bargaining without agreement, the company withdrew recognition. A supervisor circulated a petition among the employees, advising management that they did not want the union to have their names and addresses. The company then refused to provide the union with the names and addresses of employees and unilaterally granted substantial wage increases. Despite these findings, the Court found that the company had a "serious good faith doubt of the union's majority." In so ruling, the Court relied upon the closeness of the vote, the large turnover in employees, and a statement by a union official of the lack of support from employees. Here, each Petitioner relied on factors similar to those in *Alvin Bart*, as well as several additional factors.

In *W & W Steel Co. v N.L.R.B.*, 599 F.2d 934 (C.A. 10, 1979), the situation is on all fours with the instant cases. Here, the Petitioners properly withdrew from a multi-employer unit and each became a separate, independent unit. In *W & W Steel,* the employer bought a single plant which was part of a multi-plant unit. It questioned the union's majority status in the single plant. The union and the Board took the position, as in the instant cases, that the union's majority in the single plant was presumed to exist because the union had been certified as the bargaining representative following an election in the multi-plant unit. The Tenth Circuit found the employer had a reasonable doubt of the union's majority status and denied enforcement of the Board's bargaining order. The Court pointed out that the election in the multi-employer unit had taken place two years and seven months prior to the employer's takeover of the plant. In the instant cases, there never was an election in any unit. Each Petitioner here joined an employer association many years ago and by reason thereof automatically became a party to a multi-employer contract between the association and the union.

It is significant to emphasize that the dissenting opinion in *W & W Steel* states, "I acknowledge that this presumption has not received universal acclaim", and cites *N.L.R.B. v. Tahoe Nugget, Inc.*, 584 F.2d 293, n. 4 (C.A. 9, 1978), which the Court below relied on principally to summarily enforce the Board orders. The majority in *W & W Steel* place the Tenth Circuit with the Second, Sixth, Seventh, Eighth and District of Columbia Circuits, and contrary to the Ninth, holding that a Board created presumption does not rise to the level of substantial evidence.

The Sixth Circuit in *N.L.R.B. v. Richard W. Kaase Company,* 346 F.2d 24 (C.A. 6, 1965) in dealing with the

presumption of a union's continuing majority status, held that withdrawal from a multi-employer unit invalidated the presumption. The Court said there could be no presumption of continuance of a union's majority status as to a single employer after a year following certification of the union in a multi-employer election of which the employer had been a part. The Court held that before the Board could find the employer in violation of the Act by its refusal to bargain, it is essential to find that at the time of the refusal the union in fact enjoyed a majority status. This burden of so proving, said the Court, was upon the General Counsel. It was there stated (at 31):

> . . . the ambiguity inherent in the multi-employer election here relied on vitiates its efficacy to prove a majority as to any single employer. Before the continuance of the fact of majority support can be presumed, the original existence of that fact must be established.

In *Ingress-Plastene, Inc. v. N.L.R.B.*, 430 F.2d 542 (C.A. 7, 1970), denying enforcement, the Seventh Circuit in considering the objective considerations which there led the employer to question the union's continuing majority status, said (at 547):

> Although the Board attacks each of the reasons advanced by the company in support of its good faith doubt of the union's majority status, the company does not rely on any one reason alone, but rather on all as a whole. We think the entire record, including evidence against the Board's position as well as in favor of it . . . supports the company's position.

Similarly, *Star Mfg. Co., Div. of Star Forge, Inc. v. N.L.R.B.*, (C.A. 7, 1976) 536 F.2d 1192, 1196. See also *Bellwood General Hospital v. N.L.R.B.*, ... F.2d ....., (C.A. 7, 1980) [No. 79-1818 decided Aug. 11, 1980] where the

Court denied enforcement of a Board refusal to bargain order where the employer showed evidence of good faith doubt shifting the burden to the General Counsel, and the General Counsel could not establish the union's majority status.

In the instant case the Petitioners did not rely on any one reason alone, although they could have under Board precedent as we will show, but rather on all as a whole.

The Eighth Circuit in *National Cash Register Company v. N.L.R.B.*, 494 F.2d 189 (C.A. 8, 1974) reversed a finding of refusal to bargain and denied enforcement, holding the employer on the collective basis of four factors could raise a question as to the union's majority status.

The District of Columbia Circuit in accord with the Second, Sixth, Seventh, Eighth and Tenth Circuits, held an employer who relied upon the cumulative effect of multiple objective considerations, properly raised a good faith doubt as to the union's majority status. *Lodges 1746 & 743, Int. Ass'n. of Mach. & Aero. Wkrs. v. N.L.R.B.*, 416 F.2d 809 (C.A.D.C., 1969).[1]

One of the objective considerations which Petitioners considered was the fact that at the time they joined the multi-employer unit, the union did not represent a majority of either of their employees. The Board rejected this evidence on the ground that Section 10(b) of the Act [29

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1. See also *N.L.R.B. v. Nu-Southern Dyeing & Finishing Inc.*, (C.A. 4, 1971) 444 F.2d 11, in which enforcement of a refusal to bargain order was denied where an employer questioned the union's continuing majority status based on several factors, including an anti-union petition signed by a majority of employees which the Board refused to consider on the ground that the anti-union petition was the result of the employer's 8(a)(1) violations. The Court held that there were factors other than the anti-union petition, which when viewed in their combined effect, established that the company "possessed a good faith doubt of the union's majority status at the time of the refusal to bargain" (at 16).

U.S.C. § 160(b)] precluded any attack on the original recognition by the employer.[2] Section 10(b) is the so-called six months statute of limitations under the Act. The Court below agreed with the Board. Here again we have a conflict between Circuits as to the application of 10(b) under the circumstances. In *N.L.R.B. v. Dayton Motels, Inc.*, 474 F.2d 328 (C.A. 6, 1973), the Sixth Circuit in considering the same argument advanced by the Board in the same type of case, denied enforcement of the Board's order to bargain, holding (at 333):

> The fact that this evidence [relating to initial recognition] could have been the basis of an unfair labor practice charge in 1967 is coincidental and ought not to render the evidence inadmissible for another purpose.

The Board in reaching its conclusion relied upon this Court's opinion in *Local Lodge No. 1424 v. N.L.R.B.*, 362 U.S. 411, 80 S.Ct. 822 (1960).[3] The Court in *Dayton Motels, supra,* distinguished *Local Lodge No. 1424,* rightfully pointing out that it represented a different factual situation to which this Court addressed itself and that it did not preclude the use of all evidence relating to events which transpired more than six months prior to the filing of an unfair labor practice charge (474 F.2d at 333):

> In our case, however, the Company's defense is not dependent on the time-barred unfair labor practice. The evidence was offered, to be considered along with other evidence, of its good-faith doubt about the majority status of the Union.

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2. The Board relied on its earlier decision in *Jim Kelley's Tahoe Nugget,* 227 NLRB 357 (1976).

3. Sometimes referred to as the *Bryan* case.

With respect to the Board's argument, the Sixth Circuit stated (at 333-334):

> Hence, as the Board would have it, an employer who had to decide, at the expiration of an initial contract, whether to continue recognition of an incumbent Union, would have to approach the problem in the following manner: The employer would first look at the events surrounding the initial recognition of the Union to see if those events could cast doubt on the representative status of the Union. He would then have to decide whether those facts also would have supported an unfair labor practice charge. If they did reach the level of proscription under the Act, he could take them into account. If they constituted an unfair labor practice, he could not use them in making his decision.
>
> Such an artificial standard is obviously impractical and one which is well nigh impossible to be complied with. It would substantially impair, if not obliterate, the efficacy of the defense of good-faith doubt. *Bryan* did not involve the exclusion of evidence of good-faith doubt.

As mentioned, the Court below concedes that it is in conflict with the Second, Sixth, Seventh, Eighth, Tenth and District of Columbia Circuits. The Ninth Circuit states in the instant cases:

> We recognize the force of [Petitioners] contention that the Board has accorded too much weight to the presumption in these cases. This issue involves an important and difficult question which is of current national interest in the labor relations field. Respondents cite cases in other circuits which may have found the presumption rebutted upon similar or even weaker evidence than was presented in these cases. (fn.) [The footnote cites the cases from the other Circuits.] Accepting, arguendo, that a conflict exists on this issue,

> we nevertheless adhere to the views expressed in this and our previous opinions. (Appendix, p. 14)

In light of the obvious conflict between the Ninth Circuit and the other Circuits mentioned, this Court should resolve the conflict. The issue is a recurring one in the administration of the National Labor Relations Act. The resolution of the issues involved should not have to depend upon the fortuitous circumstance as to which Circuit may be dealing with them.

There Is a Conflict Among Panels of the Court Below on the Issue of Rebutting the Presumption.

In its earlier decision, the Court below held in *Dalewood Rehabilitation Hospital, Inc. v. N.L.R.B.*, (C.A. 9, 1977) 566 F.2d 77 that a combination of factors is adequate to provide a basis for an employer's good faith doubt as to a union's majority status when each factor considered alone is insufficient. In denying enforcing of a bargaining order by the Board, the panel of the Court stated (at 79-80):

> The Board concluded that each factor considered separately did not give petitioner reasonable grounds to doubt the Union's majority status and that the evidence as a whole was no greater than the sum of its separate parts.
>
> • • •
>
> The Hospital contends that all of the factors the administrative law judge considered, taken together, provided the basis for a reasonable doubt of the Union's majority status.
>
> The courts require an assessment of the cumulative force of the combination of factors. [Citations] Even when each factor considered alone is insufficient for a good faith doubt of majority status, the combination may be adequate. [Citation]

> We believe the combination here was adequate. The employee complaints, the turnover, the deauthorization vote and the decline in the number of authorized dues checkoffs all indicate a loss of Union support.
>
> We hold that the Hospital rebutted the presumption of continued majority status. The burden then shifted to the Board to prove that the Union represented a majority on the day the Hospital refused to bargain. [Citation]

Yet, the panel below considered each of the numerous factors in separate isolation, as did the Board, and concluded they were not sufficient for a good faith doubt of the Union's majority status. The factors here were equal to and in excess of those in *Dalewood Rehabilitation Hospital, supra.* This, apart from the fact that the Board laid down the principle in *Celanese Corporation of America,* 95 NLRB 664 (1951) which we shall discuss more fully *infra,* that the answer to the question of whether an employer has violated Section 8(a)(5) of the Act, depends not on whether there was sufficient evidence to rebut the presumption of the union's continuing majority status, but upon whether the employer in good faith believed that the union no longer represented the majority of the employees.

In view of the evident conflict between panels of the Court below, this matter should at least be remanded so the Court of Appeals can reconcile its internal difficulties. *Wisniewski v. United States,* 353 U.S. 901, 902, 77 S.Ct. 633, 634 (1957); *Western Pac. R. Corp. v. Western Pac. R. Co.,* 345 U.S. 247, 260, 73 S.Ct. 656, 663 (1953).

The Board's Decision Is in Direct Conflict with Its Prior Holdings on the Same Issue.

In its seminal decision adopting its presumption relating to a union's continuing majority status, the Board in

Celanese Corporation of America, 95 NLRB 664 (1951), stated:

> We believe that the answer to the question whether the Respondent violated Section 8(a)(5) of the Act on October 8 depends, *not on whether there was sufficient evidence to rebut the presumption of the Union's continuing majority status or to demonstrate that the Union in fact did not represent the majority of the employees, but upon whether the Employer in good faith believed that the Union no longer represented the majority of the employees.* The latter point was not considered by the Trial Examiner. [Part of emphasis added] 95 NLRB at 665, 28 LRRM at 1365.

In the instant case the Board relying upon *Tahoe Nugget Inc. supra* departed from its holding in *Celanese* by determining whether there was sufficient evidence to rebut the presumption. It analyzed in isolation each objective consideration which Petitioners had considered in reaching their good faith doubt. The Court below did likewise. It is to be noted the Board held in *Celanese* that the answer lies in whether "the *employer in good faith* believed that the Union no longer represented the majority of the employees." There was no finding, and there could be none, that Petitioners did not in good faith believe the Union no longer represented a majority of their respective employees. It is clear that what the Board said in *Celanese* was that the presumption is overcome if the employer in good faith believes there is doubt as to the union's majority status. Yet, the Board and the Court below substituted their judgment as to good faith belief. The criteria is not what the Board or the Court below, if they had to determine whether there was doubt, would conclude.

Neither the Board nor the Court rationalized their departure from *Celanese* which has not been overruled nor mod-

ified. In fact, the Court below did not properly consider *Celanese.* As stated in *International Union (UAW) v. N.L.R.B.,* 459 F.2d 1329, 1341 (C.A.D.C., 1972) in which the Board was reversed:

> It is an elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them. *See, e.g.,* Secretary of Agriculture v. United States, 347 U.S. 645, 653, 74 S.Ct. 826, 98 L.Ed. 1015 (1954).

Similarly, the Court in *Teamsters Local 769 v. N.L.R.B.,* 532 F.2d 1385 (C.A.D.C., 1976) again reversing the Board, held (at 1392):

> But the Rule of Law requires that agencies apply the same basic standard of conduct to all parties appearing before them. Thus, "if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."[4]

Moreover, in dealing with objective considerations, the Board in *Celanese,* supra, said that whether an employer has questioned a union's majority in good faith "can only be answered in the light of the totality of all the circumstances involved." Yet, the Board and the Court below failed to follow this principle and viewed in isolation each of the numerous factors which impelled the Petitioners to question in good faith whether the union continued to represent a majority.

Assuming, *arguendo,* that the Court below and the Board could, as they did, examine each objective consideration, in so doing they ignored prior Board precedent. Under its precedents in effect at the time Petitioners questioned the

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4. Citing *Greater Boston TV Corp. v. FCC,* (C.A.D.C. 1970) 444 F.2d 841, 852, cert. denied, 403 U.S. 923, 91 S.Ct. 2299, 2233.

Union's majority status, each of the objective considerations which came to their attention were equal to or exceeded what the Board regarded as valid objective considerations at the time. In effect, the Board, without any rationalization, did a full switch in its position. The Court below did not deal with this fact, although brought to its attention.

As to the individual factors which constituted the objective considerations, Petitioners proved: (1) that no election was ever held among the employees to determine whether they wanted to be represented by the Union; *Taft Broadcasting,* 201 NLRB 801 (1973); *Nu-Southern Dyeing & Finishing, Inc.,* 179 NLRB 573 (1969); (2) that a substantial number of employees complained to management that they were dissatisfied with the Union and did not want the Union to represent them; *Peoples Gas System, Inc.,* 214 NLRB 944 (1974); *Southern Wipers, Inc.,* 192 NLRB 816 (1971); (3) that during the period of the latest collective bargaining agreement there was a turnover of 80 to 100 percent among the employees; *Peoples Gas System, supra, Southern Wipers, Inc., supra;* (4) that during the period the collective bargaining agreement had been in effect, the Union never attempted to enforce its provisions by either inspecting the premises or soliciting grievances from employees and never filed a single grievance; *Lloyd McKee Motors, Inc.,* 170 NLRB 1278 (1968); *Peoples Gas System, Taft Broadcasting* and *Southern Wipers, Inc.,* each *supra;* (5) that the Union had experienced serious financial difficulties occasioned by a substantial loss of members; *Peoples Gas System, Taft Broadcasting,* both *supra, Viking Lithographers,* 184 NLRB 139 (1970); (6) that the Union was placed in trusteeship because of the inability of its officers

and business representatives to secure support from the employees employed in Northern Nevada, *Peoples Gas System, Taft Broadcasting, Viking Lithographers,* all *supra;* (7) that the Union conceded that only 20% of the employees involved were unionized and the Union was mounting a desperate organizing campaign, *Peoples Gas System, supra;* (8) that at the time Petitioners voluntarily recognized the Union by joining the multi-employer unit, the Union did not represent a majority of either Petitioners' employees; and (9) the substantial and material change from being a part of a multi-employer unit to a single unit employer, *Peoples Gas System, supra.*

As pointed out in *Zim's Foodliner, Inc. v. N.L.R.B.* (C.A. 7, 1974) 495 F.2d 1131, 1140:

> The Board has held that even informal employee statements to the employer regarding employee sentiment may provide a basis for good faith doubt. *Wallace Co.,* 174 NLRB 416 (1969).

In December 1974, when Petitioners challenged the Union's majority status, it relied on factors which were then Board law and which factors were individually and, at least, collectively sufficient to support their good faith doubt of the Union's continuing majority. As was so aptly put by the Court in the recent decision of *Marshall v. Baltimore & Ohio Railroad Co.* 461 F. Supp. 362 (D.C. Md., 1978): "individuals and businesses are entitled to rely on interpretations of existing law in arranging their activities." at 382.

The Board's Derivative Presumption Is Contrary to Federal Law and Is Impermissible.

The Board in the instant cases adopted its earlier fashioning a so-called derivative presumption, based on the errone-

ous rationale of the Administrative Law Judge whose brainchild it was:

> However, I believe that the presumption of continued majority flowing from the multi-employer contracts requires a *derivative presumption* of the Union's majority status which is applicable to each of the employer-members of the multiemployer bargaining unit separately. *Jim Kelley's Tahoe Nugget*, 227 NLRB 357, 363 (1976); *Nevada Lodge*, 227 NLRB 368, 374 (1976). [Emphasis supplied]

Board member Walther in attacking this novel and legally contrary approach, noting that in all of the years of the multi-employer relationship there never was any attempt to ascertain the majority sentiments of the employees, states:

> I take issue with my colleagues' conclusion that the presumption of majority status flowing from the contract in the multi-employer unit survives Respondent's timely withdrawal from that unit. By a process resembling alchemy, my colleagues have concocted the existence of majority status with only the thinnest support in legal reason and have, in complementary fashion, ignored valid distinctions between the presumptions applicable to single-employer and multiemployer units.
>
> • • •
>
> My colleagues argue that unless a majority of Respondent's employees in 1962 desired representation by Local 86 Respondent could not lawfully have forced representation on them by joining the multiemployer unit. They further note that Respondent cannot now attack Local 86's majority status among its own employees at the time of original recognition because of Section 10(b). From this my colleagues, citing cases which deal with the presumption of majority status in single-employer units, construct two entirely distinct and severable presumptions which in turn give birth to

> yet a third presumption. Starting with (1) a valid presumption of majority status in the multiemployer relationship, they turn back, and (2) interweave a second presumption of former majority status in the single-employer unit based upon the 10(b) prohibition against finding conduct which occurred years ago to be unlawful. From the interweaving of these two presumptions the majority manages to conceive yet a third presumption of current majority status in the single-employer unit which otherwise has no basis in fact or in logic. While I do believe that the Board can and should base violations of Section 8(a)(5) upon legitimate legal presumptions, a violation predicated upon a presumption raising not out of fact but out of the intermarriage of two other presumptions is, in my view, not a proper basis upon which to establish a violation. It must never be forgotten that an 8(a)(5) finding effectively prevents employees from exercising their right to a free choice in the selection of a collective-bargaining representative—a right these employees have never had an opportunity to exercise. *Jim Kelley's Tahoe Nugget,* 227 NLRB at 358; *Nevada Lodge,* 227 NLRB at 368.

Early on this Court held that a presumption cannot be built upon another presumption. *U.S. v. Ross,* 92 U.S. 281, 23 L.Ed. 707 (1876); *Manning v. Insurance Co.,* 100 U.S. 693, 698 (1880); *Looney v. Metropolitan R. Co.,* 200 U.S. 480, 26 S.Ct. 303, 306 (1906). Since then many Courts of Appeals have so similarly held. *Otis Elevator Company v. Yager,* 268 F.2d 137, 144 (C.A. 8, 1959); *Smith v. Fidelity Casualty Company of New York,* 261 F.2d 460, 462 (C.A. 5, 1958); *J. W. Ringrose v. W & J Sloane,* 266 F.2d 402, 404 (E.D. Pa., 1920), affd. 272 F. 445 (C.A. 3, 1921); *Smith v. Pennsylvania R. Co.,* 239 F. 103, 104 (C.A. 2, 1917); and *Hall v. Atchison, Topeka & Santa Fe Railway Company,* 349 F.Supp. 326, 330 (D. Kansas, 1972).

The Board here has gone even beyond basing a presumption upon a presumption. As Board member Walther points out, the Board has given "birth to yet a third presumption." 227 NLRB at 358 and 368. The Board's entire case and its conclusion, which the Court below followed, rest upon a presumption upon a presumption upon a presumption. The Board and the Court below treated its triple headed presumption as evidence. Without it, the Board had no basis for its conclusion.

In adopting the Board's derivative presumption approach, the Court below also ignored its own precedent. *Ariasi v. Orient Ins. Co.*, 50 F.2d 548, 552-554 (C.A. 9, 1931) in which the Court below cited and quoted copiously from authority that a presumption is not evidence and has no probative force. The Court below based its approval of the Board's hydra-headed presumption on policy considerations. Appendix p. 15. Policy considerations cannot override the law. The principal reason courts recognize a presumption is probability. *Ref-Chem Company v. N.L.R.B.*, 418 F.2d 127, 130-131 (C.A. 5, 1969; McCormick, Evidence, § 309, p. 641.

The Board's Presumption Is One of Irrebuttable Force and Constitutes a Denial of Due Process.

Petitioners, at the Board hearing, sought to introduce evidence which would demonstrate that the Union did not in fact represent a majority of their respective employees. The Board rejected this evidence and the Court summarily affirmed the Board on this issue but for different reasons. Said the Court:

> We affirm the Board's decision, but on a different basis. The Board cited *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 491 (2d Cir. 1975), for the proposition that union membership is irrelevant to the deter-

mination of a union's majority status. We do not agree. It is true that in a right-to-work state an employee may choose not to join a union, but, nevertheless, desire union representation. However, this observation does not render union membership irrelevant to a determination of whether an employee had a reasonable doubt of the union's majority or whether the union in fact lacked majority support. Union membership, even in a right-to-work state, is some indication of union support, through it may be only marginally relevant. *NLRB v. Tahoe Nugget,* 584 F.2d at 307, *NLRB v. Tahoe Nugget,* 584 F.2d at 307, *NLRB v. Vegas Vic, Inc.,* 546 F.2d 828 (9th Cir.), *cert. denied,* 434 U.S. 818, 54 L.Ed.2d 74, 98 S.Ct. 57 (1978), and *Terrell Machine Co. v. NLRB,* 427 F.2d 1088, 1090 (4th Cir.), *cert. denied,* 398 U.S. 929, 26 L.Ed.2d 91, 90 S.Ct. 1821 (1970), are not to the contrary.

The question asked by the resopndents was whether the Union could produce any records that would demonstrate that it had the majority support of the employees. Although not dispositive, the question had some relevance to the issues of the Union's majority status and should have been allowed.

However, based upon the record before us, we cannot say that reversible error was committed. If the Union had answered the question affirmatively, the Union's position would have been bolstered. If the question had been answered in the negative, that would have presented only slight evidence that the Union in fact did not have the majority support of the employees. Even with the addition of this evidence, the presumption would not have been rebutted.[5] Therefore, we find no error that would require a reversal. 5. See, *Barney's Club Incorp.,* 227 NLRB 414 (1976) (Board affirming administrative law judge's determination that the respondent failed to establish that the Union in fact did not represent a majority of the respondent's employees).

> Moreover, respondents did not materially rephrase the question after the administrative law judge's ruling and either ended the line of questioning or dropped the subject matter. Appendix p. 14

This reasoning is plainly wrong. As seen above the Board is bound to follow the "rules of evidence applicable to district courts" (29 U.S.C. 160(b) what the Board, with Court approval has done here, is to prevent Petitioner from submitting any evidence, in fact making the so-called rebuttable presumption conclusive in application and impermissably shifting the burden of proof to Petitioners.

Rule 301 of the Federal Rules of Evidence provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes upon a party against whom it is directed the burden of going forward with the evidence to rebut or meet the presumption, *but does not shift to such party the burden of proof in the sense of the risk of nonpersuation, which remains throughout the trial upon the party upon whom it was originally cast.* [West's 1979 ed. p. 210, (Emphasis added)]

In *Automated Business Systems v. N.L.R.B.*, 497 F.2d 262 (C.A. 6, 1974) denying enforcement of a Board bargaining order based upon the presumption of continuing majority status the Court held at 271:

> The Board would not permit the Company to introduce evidence regarding the number of cards filed in support of the decertification petition. *Thus the Board puts the burden of proof on the employer and then denies it the means of meeting its burden. We cannot accept this procedure.* (Emphasis added)

In the instant cases the Board and the Court below have denied the Petitioners access to evidence bearing on the

majority status and then imposed an insurmountable burden of proof on the Company.[5]

In defining administrative due process, this Court said in *Hormel v. Helvering,* 312 U.S. 552, 560, 61 S.Ct. 719, 723 (1941):

> Congress has entrusted the Board with exclusive authority to determine disputed facts. Under these circumstances we do not feel that petitioner should be foreclosed from all opportunity to offer evidence before the Board on this issue . . .

Despite this Court's mandate, Petitioners here were foreclosed by the Board's rejection of their proffered evidence and by the Board's application of its presumption, which made the presumption one of "irrebuttable force." This brings into play the issue of due process. The Court below, in an earlier decision, citing with approval this Court's opinion in *Hormel v. Helvering, supra,* stated in *N.L.R.B. v. Heyman,* 541 F.2d 796 (C.A. 9, 1976) at 801.[6]

> As a statute creating a presumption which operates to deny a fair opportunity to rebut would not afford due process . . . a Labor Board presumption to the same effect would also suffer shortcomings.

Also in *Heyman, supra,* the Court below held (at 801):

> . . . by coupling § 10(b) with the presumption the Labor Board would create an irrebuttable presumption having the substantive law effect that was rejected in *Local Lodge.*[7]

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5. The Company, under the Freedom of Information Act (5 U.S.C. § 551, *et seq.*) sought production of documents from the Board bearing on this. The Board refused. For a history of these attempts by the Company to obtain such information, see *Harvey's wagon Wheel, Inc. v. N.L.R.B.,* 550 F.2d 1139 (C.A. 9, 1976).

6. The Board's order was denied enforcement in that case.

7. The reference is to *Local Lodge No. 1424 v. N.L.R.B.,* 362 U.S. 411.

Here again, we have a conflict between panels of the Court below.

Moreover, the summary rejection of the proffered evidence by the Board and its application of its presumption here has the practical and actual effect of permitting the Board and the Union to stonewall any access to evidence relating to actual majority status. Thus, the Board has created an irrebuttable presumption.

This Court examined the matter of an irrebutable presumption, hence one of substantive law, in *Manhattan General E. Co. v. Commissioner of Int. Rev.*, 297 U.S. 129, 56 S.Ct. 397 (1936) and declared (297 U.S. at 134):

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress . . .

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgments and opinion of the Ninth Circuit.

Respectfully submitted,

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Appendix

No. .....

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

SILVER SPUR CASINO
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

AND RELATED CASES.

APPENDIX TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* and HOTEL - MOTEL - RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL, RESTAURANT & BARTENDERS INTERNATIONAL UNION, AFL-CIO, *Intervenor,* vs. SILVER SPUR CASINO, *Respondent.*	No. 77-2311
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* and HOTEL - MOTEL - RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, vs. NEVADA CLUB, INC., *Respondent.*	No. 77-2939

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* and HOTEL - MOTEL - RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, *Intervenor,* vs. SPARKS NUGGET, INC., d/b/a JOHN ASCUAGA'S NUGGET, *Respondent.*	No. 77-2954
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* and HOTEL - MOTEL - RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, *Intervenor,* vs. BARNEY'S CLUB, INC. *Respondent.*	No. 77-2658
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* and HOTEL - MOTEL - RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, *Intervenor,* vs. FINALLY, INC., d/b/a THE PALACE CLUB, *Respondent.*	No. 77-2938

OPINION

On Application for Enforcement of an Order of the National Labor Relations Board

Before: KENNEDY and ANDERSON, Circuit Judges, and SCHWARTZ,* District Judge.

ANDERSON, Circuit Judge:

These consolidated cases are before this court pursuant to petitions filed by the National Labor Relations Board (Board) for enforcement of its Orders.[1] 29 U.S.C. § 160(e). The unifying issue is whether the employer-respondents violated sections 8(a)(1) and (5) of the National Labor Relations Act (the Act) by refusing to bargain with the Union. We shall consider this issue first, then deal with the other issues that pertain to the individual respondents.

I. REFUSAL TO BARGAIN

A. *Background*

The respondents were all members of the Reno Employers Council (Council), a voluntary association of employers engaged in casino, restaurant and related businesses. The Council existed in part for the purpose of representing member-employers, in multi-employer units, in collective bargaining with labor organizations. The individual respondents joined the Council on different dates, but they all recognized the Union as the bargaining representative of a

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*The Honorable Edward J. Schwartz, Chief United States District Judge for the Southern District of California, sitting by designation.

1. We were advised by counsel for the respondents at oral argument that the Palace Club (No. 77-2938) had completely closed down, with no successor taking over that operation. The Board has not withdrawn its petition for enforcement of its order against the Palace Club. Without deciding whether the petition against the Palace Club has, in fact, been rendered moot, we deem this opinion to be moot as to the Palace Club if there is no employer upon whom the order may be enforced.

unit of their employees consisting of culinary workers, waiters and bartenders (employees). After being parties to successive multi-employer collective bargaining contracts with the Union,[2] respondents withdraw from their multi-employer bargaining units. Subsequent to their withdrawal from the multi-employer units, the respondents informed the Union that they would not negotiate new, individual collective bargaining agreements with the Union. Each respondent claimed to have a good faith doubt that the Union enjoyed the majority support of their respective employees.

Unfair labor practice charges were filed by the General Counsel of the Board against the respondents for their refusal to bargain with the Union. In each case the Board found that the respondents had committed unfair labor practices by withdrawing recognition of the Union as the collective bargaining representative of their employees and by refusing thereafter to bargain with the Union.[3] The Board ordered each respondent to cease and desist from the unfair labor practices and required each respondent to recognize and, upon request, bargain with the Union, and

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2. Sparks Nugget, Silver Spur, Nevada Club, and the Palace Club were in the same multi-employer bargaining unit and were signatories to the same 1972-1975 collective bargaining agreement with the Union as the Sierra Development Co., *NLRB v. Sierra Development Co.*, 604 F.2d 606 (9th Cir. 1979), and Carda Hotels, *NLRB v. Carda Hotels*, 604 F.2d 605 (9th Cir. 1979).

Barney's Club, on the other hand, was a signatory to the same 1971-1974 collective bargaining agreement with the Union as Tahoe Nugget, *NLRB v. Tahoe Nugget*, 584 F.2d 293 (9th Cir.), *cert. denied*, 442 U.S. 921, 61 L.Ed.2d 290, 99 S.Ct. 2847, *reh. denied*, ...U.S....., 62 L.Ed. 2d 122, 100 S.Ct. 186 (1979), Nevada Lodge, *NLRB v. Nevada Lodge*, *id.*, and Sahara-Tahoe, *Sahara-Tahoe Corp. v. NLRB*, 581 F.2d 767 (9th Cir.), *cert. denied*, 442 U.S. 917, 61 L.Ed.2d 284, 99 S.Ct. 2837, *reh. denied*, ...US....., 62 L..Ed.2d 122, 100 S.Ct. 187.

3. *Silver Spur Casino*, 228 NLRB 1147 (1977); *Nevada Club, Inc.*, 229 NLRB 1186 (1977); *Sparks Nugget, Inc.*, 230 NLRB 275 (1977); *Barney's Club, Inc.*, 227 NLRB 414 (1977); *Finally, Inc. d/b/a Palace Club*, 229 NLRB 1128 (1977).

post certain notices. These cases are before us in part, for the enforcement of those orders.

We enforce the Board's orders on the issue of the respondents' refusal to bargain based upon the principles we have announced in *Tahoe Nugget, Sahara-Tahoe, Carda Hotel,* and *Sierra Development.*[4]

We deal with the issue in more depth in the following discussion to emphasize and, where necessary, to clarify portions of our previous opinions.

B. *Discussion*

In an unfair labor practice proceeding before the Board the burden is upon the General Counsel to establish by a preponderance of evidence that an unfair labor practice has occurred. *NLRB v. United Brotherhood of Carpenters & Joiners, etc.,* 531 F.2d 424, 426 (9th Cir. 1976). Where an employer has been charged with a violation of section 8(a)(5), refusal to bargain, the General Counsel must show that the union represented a majority of the employees in the unit at the time the employer refused to bargain with the union. *NLRB v. Tahoe Nugget, Inc.,* 584 F.2d at 297.

1. *Presumption of Majority Support*

The General Counsel is assisted by a presumption of majority union support in its attempt to meet its burden of proving that the employer unlawfully refused to bargain. "For a reasonable time, usually one year, after certification or voluntary recognition, majority support is irrebuttably presumed absent 'unusual circumstances.' After one year, the presumption becomes rebuttable." *Id.* Where sufficient proof to rebut the presumption is not presented by the employer, the presumption carries the General Counsel's burden of proof regarding the unfair labor practice charge. *Id.*

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4. Citations at footnote 2.

An employer may rebut the presumption by presenting sufficient evidence to demonstrate that the union was actually in the minority or that the employer had a good faith reasonable doubt of the union's majority support at the time of the refusal to bargain. *Id.* If the presumption is deemed rebutted, then the General Counsel must come forward with evidence to satisfy its burden of proof. *National Cash Register Co. v. NLRB,* 494 F.2d 189 (8th Cir. 1974).

The rebuttable presumption was applied by the Board in these cases. The Board determined that the respondents had not rebutted the presumption and found that they had committed unfair labor practices by refusing to bargain with the Union.

The respondents challenge that determination on the grounds that:

a. the presumption should not be applicable in a situation where employers have withdrawn from a multi-employer unit;

b. an employer's good faith belief is all that is required to rebut the presumption of majority support for the union;

c. the objective factors considered by the respondents were sufficient to rebut the presumption of majority support for the union.

d. the respondents were improperly precluded from showing that only a minority of employees supported the union.

e. the Board has made it impossible to rebut the presumption under the circumstances.

2. *Withdrawal from the Multi-Employer Unit*

The respondents contend that their withdrawal from the multi-employer bargaining unit should allow them to start anew in their relationship with the Union. That is, they wish to be viewed as single employers faced with the Union's initial claim for recognition.

In four previous cases[5] we have rejected that approach and have determined that the presumption survives an employer's withdrawal from the multi-employer bargaining unit.[6]

The bargaining history of the respondents shows that the same fact patterns have occurred. Thus, the conclusions reached in our previous cases apply equally as well here.

Moreover, our conclusion that the presumption survives the respondents' withdrawal from the multi-employer unit is a recognition that the presumption is also grounded in policy, not just probability. *NLRB v. Tahoe Nugget,* 584 F.2d at 302. 302. The most valued objective of the Act is industrial peace. Application of the presumption is a policy determination by the Board that industrial peace is more likely to be achieved by maintaining continuity in the bargaining structure.

We have not failed to observe that, in so deciding, the Board has favored continuity in the bargaining structure over the enhancement of employee free choice. However, the Board's decision, while not enhancing employee rights, does not adversely affect those rights. As always, the employees may exercise their freedom of choice by petitioning the Board for an election to choose whether to have another representative or to have no union representation at all. Adherence to the presumption does not stifle that right.

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5. *NLRB v. Tahoe Nugget; Sahara-Tahoe Corp. v. NLRB; NLRB v. Sierra Development Co.; NLRB v. Carda Hotels.*

6. In the formation of multi-employer units, it is an unfair labor practice for an individual employer to voluntarily recognize a union which does not enjoy majority support among that employer's employees. Thus when employers join a multi-employer unit and recognize the union, they are viewed as implicitly declaring that the majority of their employees favor the union. Subsequent withdrawal from the multi-employer unit simply entails a reversion to the original unit, a unit previously determined from the employer's own conduct to favor the union's representation. *NLRB v. Tahoe Nugget* at 303.

The presumption does make it more difficult for the respondents to rely on employee rights in refusing to bargain with their employees' designated representative. However, as we stated in *Tahoe Nugget*, at 301, "[I]n refusing to bargain because of an alleged decline in union adherents, the employer is acting as vicarious champion of its employees, a role no one has asked it to assume." See, *Brooks v. NLRB*, 348 U.S. 96, 103, 99 L.Ed. 125, 75 S.Ct. 176 (1954).

We thus believe that the Board has not abused its discretion in applying the presumption of majority union support here where employers have withdrawn from a multi-employer unit.

3. *Good Faith Reasonable Doubt*

An employer may withdraw recognition from an incumbent union because of its asserted good faith doubt of the union's support. Respondents contend that under *Celanese Corporation of America*, 95 NLRB 664 (1951), the employer's good faith belief that the union no longer had the majority support of its employees is all that is required. The respondents misread *Celanese* and misconceive the law.[7]

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7. Respondents correctly quoted a passage from *Celanese* which states that:

> "We believe that the answer to the question whether the Respondent violated Section 8(a)(5) of the Act on October 8 depends not on whether there was sufficient evidence to demonstrate that the Union in fact did not represent the majority of the employees but upon whether *the Employer in good faith believed* that the Union no longer represented the majority of the employees."

Id. at 671. However, the respondents failed to turn the page and read on as the Board, later in the opinion, went on to elaborate on the "good faith" criteria, and stated that:

> "By its very nature, the issue of whether an employer has questioned a union's majority in good faith cannot be resolved by resort to any simple formula. It can only be answered in light of the totality of all the circumstances involved in a par-

An employer's good faith doubt of a union's majority status must be reasonable and supported by objective considerations. *NLRB v. Cornell of Cal., Inc.*, 577 F.2d 513, 515-516 (9th Cir. 1978); *Dalewood Rehabilitation Hospital, Inc. v. NLRB*, 566 F.2d 77, 80 (9th Cir. 1977); *NLRB v. Tahoe Nugget*, 584 F.2d at 299. Respondents' contrary interpretation of the law is erroneous.

4. *Establishing Good Faith Reasonable Doubt*

Whether an employer has established a good faith reasonable doubt defense is a determination that must be made initially by the Board. The Board's decision will be upheld if it is supported by substantial evidence on the record as a whole. *Sahara-Tahoe Corp. v. NLRB*, 581 F.2d at 771.

In *Tahoe Nugget* and *Sahara-Tahoe* we stressed that the evidence presented to establish reasonable good faith doubt, individually or cumulatively, must unequivocally indicate that union support had declined to a minority. In those cases the Board found that the employers had not established the good faith doubt defense. Some evidence was presented of employee discontent, high employee turnover rates, low union membership, financial difficulties of the union, and a vigorous union membership drive. However, after evaluating the evidence, the Board determined that the evidence introduced by the respondents was not suffi-

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ticular case. But among such circumstances, two factors would seem to be essential prerequisites to any finding that the employer raised the majority issue in good faith in cases in which a union had been certified. *There must, first of all, have been some reasonable grounds for believing that the union had lost its majority status* since its certification. And, secondly, the majority issue must not have been raised by the employer in a context of illegal anti-union activities, or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union." (emphasis added)

Id. at 673.

cient to support a good faith reasonable doubt of the union's majority status. The evidence, standing alone or viewed in their totality, presented only an ambiguous inference of loss of majority support for the union. We enforced the Board's orders in those cases, determining that there was substantial evidence on the record as a whole to support the findings.

The evidence presented here does not differ materially from that considered by the Board and this court in *Tahoe Nugget* and *Sahara-Tahoe*. The Board in the present cases found that the respondents failed to establish the good faith reasonable doubt defense. Substantial evidence on the record as a whole supports the findings that the evidence, individually or cumulatively, presents only an equivocal inference of loss of majority support for the union.

5. *Actual Loss of Majority*

The presumption may also be rebutted when the employer brings forth sufficient evidence to demonstrate that the union did not, in fact, have the support of a majority of the employees in the unit. *Tahoe Nugget*, 584 F.2d at 297.

In *Barney's Club* the administrative law judge determined that the respondent's evidence fell short of demonstrating that the union did not have majority support. The Board affirmed. Reviewing the record as a whole, we uphold that decision.

In *Silver Spur, Sparks Nugget, Nevada Club* and *Finally, Inc.*, the respondents were restricted in their ability to question Board field examiner David Sargent and Union agent Howard Lawrence. They contend that the Board's actions erroneously prevented them from presenting their "actual loss of majority" defense and thus their cases should be remanded.

a. *Board Field Examiner Sargent*

Respondents, in their individual cases, subpoenaed Board field examiner Sargent. The administrative law judges quashed the subpoenas on the basis that Sargent's testimony would have been irrelevant *(Nevada Club; Finally, Inc.)*, or that 29 CFR § 102.118 prevented the subpoena from issuing to an agent of the Board without the Board's or General Counsel's consent *(Silver Spur, Sparks Nugget)*.

In *NLRB v. Heath Tec Division/San Francisco*, 566 F.2d 1367, 1371 (9th Cir.) *cert. denied*, 439 U.S. 832, 58 L.Ed.2d 127, 99 S.Ct. 110 (1978), we stated that in the absence of some valid evidentiary objection or privilege, 29 CFR § 102.118 cannot alone be the basis for the revocation of a properly issued subpoena. Thus the rulings of the administrative law judges in *Silver Spur* and *Sparks Nugget* were erroneous. However, the Board upheld the quashing of the subpoenas in all the cases, finding that a valid evidentiary privilege and a valid evidentiary objection existed. We agree.

The Board determined that there was an evidentiary privilege which protected the informal investigatory and trial preparatory process of administrative agencies, citing *Stephens Products Co., Inc. v. NLRB*, 515 F.2d 1373, 1376-1378 (8th Cir. 1975). Sargent apparently had spoken informally to the attorneys representing the respondents and had stated that the refusal to bargain charges would probably be dismissed. Later, however, formal complaints were filed, charging the respondents with refusing to bargain. Through Sargent respondents sought to establish that the initial determinations were actually made and they also sought the information which provided the basis for those determinations.

It is clear that the testimony and documents which the respondents sought were informal investigatory material and preliminary determinations. The qualified privilege of preserving the confidentiality of investigative files is applicable here. *NLRB v. Heath Tec,* 566 F.2d at 1370; *Stephens Products Co., Inc. v. NLRB,* 515 F.2d at 1376.

As in *Heath Tec,* and *Stephens Products Co., supra,* we conclude that the investigatory privilege concerning "informal deliberations of all prosecutorial agencies and branches of government" (*Stephens Products,* p. 1376, n.1) was properly invoked. Others were present during conversations with Sargent. They were not called as witnesses, however, and respondents have shown no reason why examining these people was not possible or would not have produced information similar to that which they sought from Sargent. Moreover, we have some doubt whether the information sought was sufficiently material to respondents' case to outweigh the privilege.

b. *Union Agent Lawrence*

The Board also sustained objections to the questioning of Union agent Lawrence regarding whether the Union had any records that would disclose it represented an actual majority of the unit employees of the respective respondents. The Board determined that the line of questioning was irrelvant because where union membership was voluntary, as in Nevada, such records provided no correlation to whether a majority of employees desired representation.

We affirm the Board's decision, but on a different basis. The Board cited *Retired Persons Pharmacy v. NLRB,* 519 F.2d 486, 491 (2d Cir. 1975), for the proposition that union membership is irrelevant to the determination of a union's majority status. We do not agree. It is true that in a right-to-work state an employee may choose not to join a union,

but, nevertheless, desire union representation. However, this observation does not render union membership irrelevant to a determination of whether an employee had a reasonable doubt of the union's majority or whether the union in fact lacked majority support. Union membership, even in a right-to-work state, is some indication of union support, though it may be only marginally relevant. *NLRB v. Tahoe Nugget,* 584 F.2d at 307, *NLRB v. Vegas Vic, Inc.,* 546 F.2d 828 (9th Cir.), *cert. denied,* 434 U.S. 818, 54 L.Ed.2d 74, 98 S.Ct. 57 (1978), and *Terrell Machine Co. v. NLRB,* 427 F.2d 1088, 1090 (4th Cir.), *cert. denied,* 398 U.S. 929, 26 L.Ed.2d 91, 90 S.Ct. 1821 (1970), are not to the contrary.

The question asked by the respondents was whether the Union could produce any records that would demonstrate that it had the majority support of the employees. Although not dispositive, the question had some relevance to the issues of the Union's majority status and should have been allowed.

However, based upon the record before us, we cannot say that reversible error was committed. If the Union had answered the question affirmatively, the Union's position would have been bolstered. If the question had been answered in the negative, that would have presented only slight evidence that the Union in fact did not have the majority support of the employees. Even with the addition of this evidence, the presumption would not have been rebutted.[8] Therefore, we find no error that would require a reversal.

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8. See, *Barney's Club Incorp.*, 227 NLRB 414 (1976) (Board affirming administrative law judge's determination that the respondent failed to establish that the Union in fact did not represent a majority of the respondent's employees).

Moreover, respondents did not materially rephrase the question after the administrative law judge's ruling and either ended the line of questioning or dropped the subject matter.

6. Impossibility of Rebutting the Presumption

Finally, the respondents contend that the Board has in effect created a presumption that is impossible to rebut. Respondents argue that the burden is placed upon them to rebut the presumption, but they are denied the means to do so. Further, the respondents contend that the Board has demanded more evidence than should be required to rebut the presumption.

We find no merit to the respondents' first argument. As we discussed in the previous section, the Board's rulings regarding Board field examiner Sargent and union agent Lawrence did not improperly deny the respondents access to information.

As to the respondents' second argument, we recognize the force of their contention that the Board has accorded too much weight to the presumption in these cases. This issue involves an important and difficult question which is of current national interest in the labor relations field. Respondents cite cases in other circuits which may have found the presumption rebutted upon similar or even weaker evidence than was presented in these cases.[9] Accepting, argu-

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9. Respondents have cited cases from various circuits where the presumption of majority support was deemed rebutted. See, *e.g.*, *Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542 (7th Cir. 1970); *Star Manufacturing Co. v. NLRB*, 536 F.2d 1192 (7th Cir. 1976); *Lodges 1746 & 743, Int'l Ass'n of Mach. & Aero. Workers v. NLRB*, 416 F.2d 809 (D.C. Cir.), *cert. denied*, 396 U.S. 1058, 24 L.Ed.2d 752, 90 S.Ct. 751 (1970); but see, *Teamsters Local U. 769 v. NLRB*, 532 F.2d 1385 (D.C. Cir. 1976); *National Cash Register Co. v. NLRB*, 494 F.2d 189 (8th Cir. 1974); *National Car Rental System v. NLRB*, 594 F.2d 1203 (8th Cir. 1979); *NLRB v. Alvin J. Bart & Co., Inc.*, 598 F.2d 1267 (2d Cir. 1979); *W & W Steel Co. v. NLRB*, 599 F.2d 934 (10th Cir. 1979); *Automated Business Systems v. NLRB*, 497 F.2d 262 (6th Cir. 1974; *NLRB v. Nu Southern Dyeing & Finishing, Inc.*, 444 F.2d 11 (4th Cir. 1971); *NLRB v. Randall-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978). Of these cases cited by respondents, we believe only *W & W Steel Co. v. NLRB*, *Star Manufacturing Co. v. NLRB*,

endo, that a conflict exists on this issue, we nevertheless adhere to the views expressed in this and our previous opinions. While we find that there is substantial evidence on the record as a whole to support the Board's decision in each of these cases, we also believe that the policies and goals of the Act will be best served by the enforcement of the Board's orders on the respondents' refusal to bargain.

II. *NO SOLICITATION RULE*

A. *Background*

In *Barney's Club* and *Sparks Nugget* the employers promulgated no-solicitation rules which, among other things, prohibited employees from soliciting on company premises after their shifts had been completed. The Board determined in both cases that the employers had violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by maintaining the rules. We agree with the Board that the rules promulgated by these respondents were violative of Section 8(a)(1). However, we believe the Board's orders were too broad. We thus enforce the Board's order as modified herein.

B. *Discussion*

1. *Applicable Law*

The freedom to communicate is essential to the effective exercise of organizational rights granted to employees under Section 7 of the Act, 29 U.S.C. § 157. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543, 33 L.Ed.2d 122, 92 S.Ct. 2238 (1972); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491, 57 L.Ed.2d 370, 98 S.Ct. 2463 (1978). However, the

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and *Ingress-Plastene, Inc. v. NLRB*, present factual situations in which other circuits may have found the presumption of majority support rebutted upon similar or weaker evidence than presented in these cases.

right of employees to solicit or distribute materials must be balanced against an employer's right to maintain discipline in its establishment. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 797-798, 89 L.Ed. 1372, 65 S.Ct. 982 (1945). Thus, certain rules have been developed with respect to the exercise of employee organizational rights under Section 7. Since "working time is for work," a rule prohibiting employee solicitation and distribution of literature during work time is presumed to be valid. On the other hand, "the time outside work, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint," even though he is on company property. Therefore, a rule prohibiting employee solicitation or distribution of literature during nonworking time in nonwork areas is presumptively invalid unless special circumstances warrant the adoption of the rule. *Republic Aviation,* at 802 n. 10; *NLRB v. Magnavox Co.,* 415 U.S. 322, 325, 39 L.Ed.2d 358, 94 S.Ct. 1099, *reh. denied,* 416 U.S. 952, 40 L.Ed.2d 302, 94 S.Ct. 1962 (1974).

The finding of the requisite "special circumstances" or an exception to the presumption of invalidity may arise where the business is one dealing in direct selling and service to customers. The Board has approved employer rules which prohibit all employee solicitations, even during an employee's nonworking time, in the selling areas of stores and restaurants on the theory that such activity may tend to drive away customers. *May Department Stores Co., d/b/a Famous-Barr Co.,* 59 N.L.R.B. 976, 981, *enf'd as modified,* 154 F.2d 533 (8th Cir.), *cert. denied,* 329 U.S. 725, 91 L.Ed. 627, 67 S.Ct. 72 (1946); *Goldblatt Bros., Inc.,* 77 N.L.R.B. 1262, 1264 (1948); *Marriott Corp., Children's Inn*), 223 N.L.R.B. 978 (1978); *see also Beth Israel Hospital* at 493. In allowing the broader no-solicitation rules, the goal has

been to strike the appropriate balance between organizational rights of employees and the rights of employers to control their businesses. Thus, as the Supreme Court stated in *Beth Israel Hospital* at 506:

> "In the retail marketing and restaurant industries, the primary purpose of the operation is to serve customers, and this is done on the selling floor of a store or in the dining area of a restaurant. Employee solicitation in these areas, if disruptive, necessarily would directly and substantially interfere with the employer's business. On the other hand, it would be an unusual store or restaurant which did not have stockrooms, kitchens, and other nonpublic areas, and in those areas employees solicitation of nonworking employees must be permitted. In that context, the Board concluded that, on balance, employees' organizational interests do not outweigh the employer's interests in prohibiting solicitation on the selling floor."

However, the fact that an establishment is a restaurant or a store does not automatically allow it to impose a broad no-solicitation rule. In *Beth Israel Hospital* the question was whether a hospital cafeteria could prohibit employee solicitations in its dining room. The Supreme Court noted that the primary purpose of the hospital was patient care and therapy. The hospital cafeteria functioned more as an employee-service area than a patient care area, as 77% of its patrons were employees. Thus the Court stated that "when the primary function and use of the cafeteria, the availability of alternative areas of the [hospital] facility in which § 7 rights effectively could be exercised, and the remoteness of interference with patient care are considered," it was appropriate for the Board to strike the balance in favor of § 7 rights in the hospital cafeteria. *Id.* at 506. Therefore, the relationship of the restaurant or store to the employer's business enterprise must also be

considered in striking the appropriate balance between employee and employer rights.

Even though an employer's business enterprise justifies a more restrictive no-solicitation rule, that rule may be over-broad and thus invalid. *Marriott Corp.* at 978. In *Marriott Corp.* the Board stated that the employer could prohibit solicitation, even during employee break and lunch periods, in areas where customers were likely to be present. However, the Board determined that the employer's rule was not limited to the customer or sales area of the restaurant; thus the rule was declared to be over-broad and invalid on its face.

2. *Present Cases*

In *Barney's Club* and *Sparks Nugget* the respondent employers are engaged primarily in the direct service of customers through their gambling, restaurant and bar facilities. There is no contention that any of these facilities serve primarily as employee-service areas. Thus, under the previously-discussed precedents, the respondents could promulgate no-solicitation rules which prohibited employees from engaging in solicitation or distribution of materials in areas open to the public even during nonworking periods.

We agree with the Board, though, that the rules promulgated by the respondents were overly broad and thus invalid. However, the Board's orders in these cases were themselves overly broad. The orders stated that the respondents must cease and desist from:

> "maintaining any rule or regulation prohibiting its employees from soliciting on its premises after their shifts have been completed unless such prohibition is demonstrably necessary to maintain production, discipline or security."

The orders go too far. Since the respondents could prohibit their employees from soliciting during nonworking hours in public areas of their premises, we modify the Board's order to read that the respondents must cease and desist from:

> "maintaining any rule or regulation prohibiting its employees from soliciting on its premises during nonworking hours in nonpublic areas of its premises."

We enforce the Board's order on this issue as modified.

III. *UNILATERAL CHANGES*

As long as its bargaining obligation is not extinguished, an employer has a continuing duty to bargain over mandatory subjects of bargaining without instituting unilateral changes, even after the expiration of the prior agreement. *NLRB v. Sky Wolf Sales,* 470 F.2d 827 (9th Cir. 1972). See, *Allied Chemical & Alkali Workers v. Pittsburg Plate Glass Co.,* 404 U.S. 157, 30 L.Ed.2d 341, 92 S.Ct. 383 (1971). Mandatory subjects of collective bargaining include insurance benefits and grievance procedures for employees. 404 U.S. at 159; The Developing Labor Law, 404 (1971).

In *Sparks Nugget,* the Board found that the employer committed unfair labor practices in violation of Sections 8(a)(5) and (1) of the Act, 29 U.S.C. §§ 158(a)(5) and (1), by unilaterally implementing a new grievance procedure and a new insurance program.

The respondent's sole argument to justify the unilateral change in the grievance procedure was that the change was made after its obligation to bargain had terminated. We have already ruled in Section I that there was a continuing duty to bargain. The respondent's unilateral change of the

grievance procedures was an unfair labor practice. *NLRB v. United Nuclear Corp.*, 381 F.2d 972 (10th Cir. 1967). We enforce the Board's order on this issue.

There appears to be little question that the new insurance plan was implemented by the respondent without consultation or negotiation with the Union over the matter. The respondent was found to have committed an unfair labor practice. The administrative law judge, however, limited the proposed remedy to requiring the respondent to "cease and desist from unilaterally altering or modifying the terms and conditions of a collective bargaining agreement it may have with the Union" (R. 151) because he found that the Union had condoned the respondent's actions.[10] The decision and order were affirmed by the Board. We cannot agree that an unfair labor practice can be found as the acts were condoned.

Condonation takes place when the injured party demonstrates a willingness to forgive the improper conduct and "wipe the slate clean." *Confectionery & Tobacco Drivers & Warehousemen's Union v. NLRB*, 312 F.2d 108, 113 (2d Cir. 1963); *Cast Optics Corp. v. NLRB*, 458 F.2d 398, 404 (3d Cir.) *cert. denied*, 409 U.S. 850, 34 L.Ed.2d 92, 93 S.Ct. 58 (1972). In *Confectionery & Tobacco Drivers*, employees had engaged in a walkout in violation of their contractual no-strike clause. The court there stated, however, that,

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10. The administrative law judge stated:

"It further appears from the failure of the Union to lodge any protest with regard to the unilateral implementation of the program, the position taken by the Union as to compliance with Section 3 of article XVIII, and the attempt, disclosed in McKinlay's testimony, to obtain benefits for an employee under the program, that the Union condoned the Respondent's failure to consult with it prior to its implementation . . . ." (R. 151)

The Board affirmed the administrative law judge's findings.

"[A]fter a condonation the employer may not rely upon prior unprotected activities of employees to deny reinstatement to, or otherwise to discriminate against them." 312 F.2d at 113.

We agree with the Board that condonation took place with regard to the implementation of the new insurance plan. The Union's condonation of the unilateral action, however, "wipes the slate clean." The Board erred in its application of the law on condonation; there was no unfair labor practice upon which to base the charge. We, therefore, deny enforcement of the cease and desist order.

IV. *REFUSING TO PROVIDE A COPY OF THE NEW INSURANCE PLAN*

There is a duty on the part of the employer to supply the Union, upon request, with sufficient information to enable the Union to effectively carry out its collective bargaining duties. *San Diego Newspaper Guild, etc. v. NLRB*, 548 F.2d 863, 866 (9th Cir. 1977). The information however, must be relevant to a legitimate union collective bargaining need. *Id.* 548 F.2d at 867. Failure of the employer to comply with a request for relevant information is a violation of Sections 8(a)(5) and (1) of the Act, 29 U.S.C. §§ 1158(a)(5) and (1).

The administrative law judge found, and the Board summarily affirmed, that the respondent committed an unfair labor practice in violation of Sections 8(a)(5) and (1) by its refusal to furnish the Union with a requested copy of the new insurance program. Since there was a continuing duty to bargain, the refusal to comply with the request was found to inhibit the Union in meaningfully bargaining with the respondent. We enforce the Board's order on this issue; substantial evidence on the record as a whole supports the Board's determination.

V. *INTERROGATION OF EMPLOYEE LAUNIUS*

Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), provides that it shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights guaranteed under Section 7 of the Act. The questioning of employees by the employer regarding their concerted activities can be a violation of Section 8(a)(1) where it interferes with Section 7 rights. *Amalgamated Meat Cutters, etc., Local No. 364 v. NLRB,* 435 F.2d 668 (9th Cir. 1970). However, employer questioning of employees regarding their concerted activities is not per se unlawful. *Penasquitos Village, Inc. v. NLRB,* 565 F.2d 1074, 1080 (9th Cir. 1977). "The test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with employees in the exercise of their protected rights." *Id.* at 1080. To be an unfair labor practice, interrogation "must be associated with express or implied treats or promises, or form part of an overall pattern tending to restrain or coerce employees with regard to their protected activities. *Amalgamated Meat Cutters,* 435 F.2d at 669.

The Board affirmed the administrative law judge's finding that the employer in *Sparks Nugget* unlawfully interrogated employee Gail Launius in violation of Section 8(a)(1). The administrative law judge's determination was based upon its finding that the totality of the circumstances indicated animosity towards the employee for her union activity and that a threat of discharge for any "further" violation of the company's no solicitation rule was made.

This issue presents a close question. However, the inferences drawn from the facts by the administrative law judge and affirmed by the Board are reasonable. Finding substantial evidence on the record as a whole, we enforce the Board's order on this issue.

VI. *REPRIMAND OF EMPLOYEE DYER*

An employer violates Sections 8(a)(3) and (1) of the Act, 29 U.S.C. §§ 158(a)(3) and (1) by discriminating to encourage or discourage membership in any labor organization. *Radio Officers' Union v. NLRB,* 347 U.S. 17, 98 L.Ed. 455, 74 S.Ct. 323 (1954). Discrimination violative of Sections 8(a)(3) and (1) may be found where an employer disciplines an employee because that employee has engaged in or is suspected of engaging in union activities. *NLRB v. Bin-Dictator Co.,* 356 F.2d 210, 214-215 (6th Cir. 1966).

The Board found that employee John Dyer was reprimanded by the employer in *Sparks Nugget* because he was suspected of engaging in union activities and the employer sought to deter him from such activities. (R. 146) While different inferences may be drawn from the facts, the inferences drawn by the Board were reasonable and supported by substantial evidence on the record as a whole. We enforce the Board's order on this issue.

CONCLUSION

Summarizing our disposition of the various issues considered:

1. We enforce the Board's orders with regard to the respondents' refusal to bargain (Section I);

2. The Board's orders concerning the respondents' no solicitation rules in *Barney's Club* and *Sparks Nugget* are enforced as modified (Section II);

3. The Board's order regarding the unilateral changes made in *Sparks Nugget* is enforced as to the unilateral implementation of the new grievance procedure, but denied as to the unilateral implementation of the insurance program (Section III);

4. The respondent in *Sparks Nugget* committed an unfair labor practice in refusing to provide the Union

with a copy of the new insurance program; therefore, we enforce the Board's order on that issue (Section IV);

5. The interrogation of Sparks Nugget employee Launius and the reprimand of employee Dyer were unfair labor practices. Thus, we enforce the Board's order on those issues (Sections V & VI).

IT IS SO ORDERED.

Received Richard H. Deane
Clerk, U.S. Court of Appeals
JUN 9 1980
Filed 7-14-80 OS
Docketed 6-9-80 DZ

Received AUG 8 1980
Severson, Werson, Berke & Melchior

United States Court of Appeals
For the Ninth Circuit

No. 77-2311

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86
Intervenor,

v.

SILVER SPUR CASINO.,
Respondent.

JUDGMENT

Before: KENNEDY and ANDERSON, Circuit Judges, and SCHWARTZ,* District Judge.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforcement of an order issued by it against the Respondent, Silver Spur Casino, Reno, Nevada, its officers, agents, successors, and assigns on April 4, 1977. The Court heard arguments of respective counsel on December 12, 1979, and has considered the briefs and transcript of record filed in this cause. On May 27, 1980, the Court, being fully advised of the premises, handed down its opinion granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Silver Spur Casino, Reno, Nevada, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and to bargain collectively in good faith concerning rates of pay, wages, hours of employment, and other terms and conditions of employment with Hotel-Motel-Restaurant Employees and Bartenders Union, Local 86, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All employees employed by Silver Spur Casino in its bar and culinary operations at its Reno, Ne-

*The Honorable Edward J. Schwartz, Chief United States District Judge for the Southern District of California, sitting by designation.

vada, place of business, excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Reno, Nevada, facility copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 20, of the National Labor Relations Board (San Francisco, California) after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecuitve days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the aforesaid Regional Director in writing, within 20 days from the date of this Judgment, what steps have been taken to comply herewith.

Endorsed, Judgment Filed and Entered

SO ORDERED:

JUDGES:

ANTHONY M. KENNEDY
ANTHONY M. KENNEDY, CJ

J. BLAINE ANDERSON
J. BLAINE ANDERSON, CJ

EDWARD J. SCHWARTZ
EDWARD J. SCHWARTZ, DJ

/s/ RICHARD H. DEANE
RICHARD H. DEANE
Clerk

A TRUE COPY

ATTEST:

RICHARD H. DEANE
Clerk

A TRUE COPY
ATTEST 7 - AUG. 1980

Richard H. Deane
Clerk of Court

by: Oscar Tagle
Deputy Clerk

Clerk, U.S. Court of Appeals
JUN 9 1980
Filed 7-14-80 OS
Docketed 6-9-80 DZ

Received AUG 8 1980
Severson, Werson, Berke & Melchior

United States Court of Appeals
For the Ninth Circuit

No. 77-2939

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86
Intervenor,

v.

NEVADA CLUB, INC.,
Respondent.

JUDGMENT

Before: KENNEDY and ANDERSON, Circuit Judges, and SCHWARTZ,* District Judge.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforcement of an order issued by it against the Respondent, Nevada Club, Inc., Reno, Nevada, its officers, agents, successors, and assigns on June 3, 1977. The Court heard argument of respective counsel on December 12, 1979, and has considered the briefs and transcript of record filed in this cause. On May 27, 1980, the Court, being fully advised of the premises, handed down its opinion granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Nevada Club, Inc., Reno, Nevada, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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*The Honorable Edward J. Schwartz, Chief United States District Judge for the Southern District of California, sitting by designation.

(a) Refusing to recognize and bargain with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, (hereinafter called the Union) as the exclusive bargaining representative of the employees in the appropriate bargaining unit described below; with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees:

> All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors, as defined in the Act.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees, and if an understanding is reached, embody such understanding in a signed agreement. The unit found appropriate for the purposes of collective bargaining is:

> All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors, as defined in the Act.

(b) Post at its Reno, Nevada, place of business copies of the attached Notice marked "Appendix." Copies of the notice on forms provided by the Regional Director for Region 20 of the National Labor Relations Board (San Francisco, California) after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(c) Notify the aforesaid Regional Director in writing, within 20 days from the date of this Judgment, what steps the Respondent has taken to comply herewith.

Endorsed, Judgment Filed and Entered

SO ORDERED:

JUDGES:

ANTHONY M. KENNEDY
ANTHONY M. KENNEDY, CJ

J. BLAINE ANDERSON
J. BLAINE ANDERSON, CJ

EDWARD J. SCHWARTZ
EDWARD J. SCHWARTZ, DJ

/s/ RICHARD H. DEANE
RICHARD H. DEANE
Clerk

A TRUE COPY

ATTEST:

RICHARD H. DEANE
Clerk

A TRUE COPY
ATTEST 7 - AUG. 1980
Richard H. Deane
Clerk of Court
by: Oscar Tagle
Deputy Clerk

Received Richard H. Deane
Clerk, U.S. Court of Appeals
JUN 9 1980
Filed 7-14-80 OS
Docketed 6-9-80 DZ

Received AUG 8 1980
Severson, Werson, Berke & Melchior

United States Court of Appeals
For the Ninth Circuit

No. 77-2938

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

HOTEL-MOTEL-RESTAURANT EMPLOYEES
& BARTENDERS UNION, LOCAL 86
Intervenor,

v.

FINALLY, INC., d/b/a THE PALACE CLUB,
Respondent.

JUDGMENT

Before: KENNEDY and ANDERSON, Circuit Judges, and SCHWARTZ,* District Judge.

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* The Honorable Edward J. Schwartz, Chief United States District Judge for the Southern District of California, sitting by designation.

THIS CAUSE came to be heard upon an application of the National Labor Relations Board for the enforcement of an order issued by it against the Respondent, Finally, Inc., d/b/a Palace Club, Reno, Nevada, its officers, agents, successors, and assigns on June 2, 1977. The Court heard argument of respective counsel on December 12 1979, and has considered the briefs and transcript of record filed in this cause. On May 27, 1980, the Court, being fully advised of the premises, handed down its opinion granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Finally, Inc., d/b/a Palace Club, Reno, Nevada, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, (hereinafter called the Union) as the exclusive bargaining representative of the employees in the apropriate bargaining unit described below, with regard to wages, hours, working conditions, and other terms and conditions of employment of the unit employees:

> All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees, and if an understanding is reached, embody such understanding in a signed agreement. The unit found appropriate for the purpose of collective bargaining is:

> All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act.

(b) Post at its Reno, Nevada, place of business copies of the attached notice marked "Appendix." Copies of the notice on forms provided by the Regional Director for Region 20 of the National Labor Relations Board (San Francisco, California) after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by other material.

(c) Notify the aforesaid Regional Director in writing, within 20 days from the date of this Judgment, what steps the Respondent has taken to comply herewith.

Endorsed, Judgment Filed and Entered

SO ORDERED:

/s/ RICHARD H. DEANE
RICHARD H. DEANE
Clerk

JUDGES:

ANTHONY M. KENNEDY
ANTHONY M. KENNEDY, CJ

J. BLAINE ANDERSON
J. BLAINE ANDERSON, CJ

EDWARD J. SCHWARTZ
EDWARD J. SCHWARTZ, DJ

A TRUE COPY

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RICHARD H. DEANE
Clerk

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